Supreme Court, U. S.
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80-765

No. .....

Supreme Court of the United States

October Term, 1980

BROWN INSULATING SYSTEMS, INC.,
Petitioner,

vs.

SECRETARY OF LABOR

and

OCCUPATIONAL, SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW

Are claimed violations of 29 C.F.R. 1910.1001(b)(2) proved by testimony of OSHA Laboratory technician using only one of twenty-one ambient air samples as "criteria", without proof of the relation of said air sample to a specific area and plant air conditions existing at the time the specific sample was secured?

Is not 29 C.F.R. 1910.1001(b)(2) constitutionally vague, indefinite and discriminatory by failing to define "exposure" as exposure to quality of air *breathed* by employees inside respirators, rather than leaving the regulation of exposure to claimed contaminated air to choice of Secretary of Labor based upon one air sample secured in the ambient air in the Petitioner's plant?

Is a claimed 29 C.F.R. 1910.1001(c)1(i) violation proved by evidence and testimony which related to "possible" methods of engineering control which were admittedly not known to be commercially feasible and effective, nor capable of performing the service required?

Based upon statements in the Federalist papers, mandates of the Ratifying Conventions and Rule of Law pertaining to the Commerce clause, is not Congress limited legislatively to enforcing prohibitions against States levying taxes on interstate commerce, thereby making all other legislation enacted by Congress regulating private and free enterprise within States null and void, as well as all legislation creating and implementing OSHA, stemming from an erroneous assumption of the existence of a general welfare clause; resulting in denying the Petitioner, its individual rights guaranteed by the First, Fourth and Fourteenth Amendments of the Federal Constitution and Bill of Rights by reason of the Order of the United States Court of Appeals for the Sixth Circuit affirming the decision and order of the OSHRC?

LIST OF ALL PARTIES

The Petitioner is Brown Insulating Systems, Inc., the manufacturer of asbestos sleeves, which fit inside molds for steel and iron castings, to insure the insulation of metal risers, which are necessary to the production of nonporous castings by the foundry industry, together with other insulation products.

The Respondents are the Secretary of Labor and Occupational Safety and Health Review Commission.

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OPINIONS BELOW

The Opinion and Order of the United States Court of Appeals for the Sixth Circuit, dated June 16, 1980, is reproduced in the Appendix at page A1. The Decision and Order of the Administrative Law Judge, dated April 20, 1978, is reproduced in the Appendix at page A3.

JURISDICTION

The jurisdiction of the Court is invoked on the grounds of the Opinion and Order of the United States Court of Appeals for the Sixth Circuit, dated June 16, 1980, pursuant to Title 29 U.S.C., Section 660(a) and Title 28 U.S.C., Sec-

tion 1254. The Order granting an extension of time within which to petition for a Writ of Certiorari, dated September 9, 1980, is reproduced in the Appendix at page A27.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First, Fourth and Fourteenth Amendments to the United States Constitution, see Appendix, p. A28; and, 29 Code of Federal Regulations 1910.1001(b)(2) and (c)(1)(i) of the Asbestos Standard, see Appendix, p. A29.

STATEMENT OF THE CASE

Petitioner (hereinafter Brown) maintains a manufacturing facility at North Royalton, Ohio where it is engaged in the manufacturing of asbestos insulating sleeves for risers used in the foundry industry.

As a result of an inspection of Brown manufacturing facility on January 27, 1977, the Secretary of Labor alleged Brown violated Section 5(a)(2) of the Occupational Safety and Health Act by failing to comply with specific occupational safety and health standards referable to the limits of exposure of employees to asbestos fibers related to products manufactured by Brown.

A Complaint was initiated by the Secretary of Labor, directed to Brown, pursuant to Section 10 of the Occupational Safety and Health Act of 1970 (hereinafter referred to as Act).

The case was assigned to Hon. Paul L. Brady, J., OSHRC for a hearing pursuant to Section 10(c) of the Act.

Hearings were held on July 20-22, 1977 and November 14-15, 1977.*

On April 20, 1978, Hon. Paul L. Brady, J., issued a Decision and Order wherein he found Brown was in violation of the following standards of the Safety and Health Regulations:

> On January 27, 1977, petitioner was in serious willful violation of the standards at 29 C.F.R. 1910.1001(b)(2) and (c)(1)(i), and had failed to correct previous violations of the same standards within the time specified.

As part of his Decision, Hon. Paul L. Brady, J., entered the following Orders:

> The citations alleging serious and willful violations of the standards at 29 C.F.R. 1910.1001(b)(2) and (c)(1)(i) are hereby affirmed and a penalty in the amount of $1,500.00 is assessed.
>
> The notification of failure to correct violations of the standards at 29 C.F.R. 1910.1001(b)(2) and (c)(1)(i) are hereby affirmed and a penalty in the amount of $1,500.00 is assessed.

There being no review of the Decision and Order of Hon. Paul L. Brady, J., by the Occupational Safety and Health Review Commission; Brown, on July 20, 1978, filed a Petition for Review and to Set Aside the Final Order of the Occupational Safety and Health Review Commission in the United States Court of Appeals for the Sixth Circuit, Cincinnati, Ohio.

Brown based its appeal upon the following key issues:

1. Findings of fact that employees were exposed to excessive concentrations of airborne asbestos fibers,

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*For purposes of transcript reference, the transcript of the July proceedings will be referred to as "TrA" and the November proceedings will be referred to as "TrB".

in violation of the standard, are not supported on the record. Only one (1) out of twenty-four (24) air samples sent to the OSHA Laboratory in Salt Lake City was used by the OSHA science technician to prove the excess of asbestos fibers allowable. The OSHA science technician testified he only did dispersion staining on one sample of the twenty-four samples "for the court case" as his "criteria for what had occurred in the plant." He further testified he did not know whether the figure (80%) he used to indicate excess of asbestos fibers applied to any particular area in the plant; and, did not know from where the sample was obtained; and said "maybe (the 80% figure) does not apply". (TrB 56-74)

2. Limited testing was made of plant air *outside* respirators used by employees in two areas (mixing and wet cutting) of the plant. The use of only one ambient air sample, which had been dispersion stained, out of twenty-one ambient air samples to determine "violations" did not fairly constitute a reliable testing of "exposure" to prove violations of 29 Code of Federal Regulations 1910.1001(b)(2).

3. The words "exposed" and "exposure", as used in 29 C.F.R. 1910.1001(b)(2) and (c)(1)(i), should be interpreted to relate to the quality of air actually being breathed by the Brown employees, who were using respirators, while working in the mixing and wet saw cutting areas of the plant, rather than testing the ambient air in such areas as the basis for determining an employee's "exposure"; and, whether an employee was "exposed" to an excessive concentration of asbestos fibers.

4. The testimony and evidence introduced by the Secretary failed to prove an adequate dust collection system was presently available for installation in the Brown plant to control airborne asbestos fibers which was economically and technically feasible.

5. The testimony relative to the testing methods to determine "exposure" and being "exposed" to excessive concentrations of airborne asbestos fibers, including the testimony and evidence introduced to substantiate such "exposure", as well as the proof offered pertaining to the availability of a dust collection system which was economically and technically feasible, which formed the basis for the Decision and Order of the Administrative Law Judge; and the Opinion and Order of the United States Court of Appeals for the Sixth Circuit affirming said Decision and Order, was legally insufficient and deprives Brown of its constitutional rights guaranteed by the First, Fourth and Fourteenth Amendments to the Federal Constitution.

The facts which are believed to be material to a consideration of the questions presented are herewith summarized.

On January 27, 1977, Mr. Gregory, an OSHA Industrial Hygienist, conducted ambient air sampling tests of two employees in the area of the mixing operation and wet saw cutting operation in the Brown plant (TrA 81-96). At the time the ambient air samples were taken, the mix man was wearing a respirator; and, the wet saw employee was wearing a respirator (TrA 94).

The ambient air around where the employees were working was not tested for an eight (8) hour period, nor were area ambient air samples taken over an eight (8) hour period.

No tests of the air the employees "sampled" actually were breathing were made, since Mr. Gregory was not equipped to do such testing (TrA 147). Mr. Gregory could not say whether the air the employees were actually breathing contained asbestos fibers or any other foreign material (TrA 147-148 and TrB 189-190).

A more accurate reading of the quality of the air an individual would actually be breathing would be obtained by taking samplings of the air between the respirator and mouth and nose of the individual (TrA 149-150). There would be variations in the exposure level due to changes of temperature, atmosphere, people moving about, activity and the amount of work being done. Variations in exposure level would be different from day to day and month to month (TrA 151).

Mr. Daryl Peterson, a science technician for the OSHA Laboratory in Salt Lake City, received asbestos air samples from the hygienist in Cleveland, Ohio, which were obtained from an inspection of Brown Insulating Systems, Inc., with a request to analyze said asbestos air samples (TrB 8-9).

Mr. Peterson stated the only definite way Amosite fibers could be identified would be with dispersion staining. Prior to doing the dispersion staining, he made an estimate of how many Amosite fibers were in each sample, **assuming** the fibers were all Amosite (TrB 53).

Mr. Peterson admitted he could have made some mistakes in connection with his assumption as to the fibers all being Amosite (TrB 53).

When he learned this would be a court case, he found the samples and did other tests. He stated "I better check and see if all of these are Amosite." He used the dispersion staining technique on one sample, but did not do the dispersion staining on any of the others for the court case (Tr.B 48-49 and 58).

He testified that from that sample which approximated 80% Amosite fibers, he used that figure as his testimony in this case (TrB 57-58). He used the results obtained from only one (1) sample as his "criteria" for what occurred in the Brown plant. He received a total of twenty-one (21) samples, but he used only one (1) sample for his testimony in this case (TrB 59-60). Mr. Peterson stated he did not know whether the figure of 80% Amosite fibers applied to any particular area of the plant, since he was not sure of the conditions in the plant. He did not know from what area in the plant the one (1) sample he used as the basis for his testimony was obtained (TrB 73-74).

Mr. Peterson said to be absolutely correct as to what he found in testing the one (1) sample, he would have to relate the sample to the area and the conditions that existed at that particular time. He could not assume the conditions occurred at all times in the Brown plant (TrB 79).

He did not do a percentage count on any of the other samples which he examined (TrB 79).

Brown's witness, David Winik, testified, in May of 1977, he was employed by Mogul Corporation as an environmental chemist. He did water analysis, air testing and air monitoring when he was working for Mogul. He monitored air for asbestos fibers at Brown Insulating Company. He followed the OSHA recommended testing procedures, the standard procedure for air monitoring (TrB 125-126). Mr. Winik described the procedures he undertook; and, how he arrived at the figures which are represented on Exhibit R-6c. A plastic cassette was mounted in the mask. There are three pieces fitting one inside the other; and, a filter is put in between. The purpose of the cassette is to hold the filter and an inlet and outlet for

drawing air through the filter. Anything in the air will get trapped on the filter. The filters are analyzed for fibers according to OSHA methods. The analysis was made at Mogul Laboratories (TrB 128-129).

Three men were tested, on April 20, 1977. One person was at the dry saw, another in the mix area and one person running the dielectric oven, drying off the product (TrB 131). The testing results indicated the employee working at the dry saw was breathing air containing .27 and .34 asbestos fibers. The employee working in the mix area was breathing air containing .22 and .13 asbestos fibers. The employee working at the dielectric oven was breathing air which contained .05 asbestos fibers. Therefore, the employees, referred to, were breathing air which contained less than two asbestos fibers per cubic centimeter, as set forth in the OSHA regulations (TrB 132). This was the only time he performed a test of the air behind the masks. His data was reported out as indicated on the typed sheet. In doing the work, he followed the OSHA regulations (TrB 132-133). The test results show what the results were, there was no approximation. Those were the numbers he tested and obtained; and, they are a good indication of what was on the filter, which was the air inside the mask (TrB 138-139).

Another Brown witness, Terry Gene Check, testified he is employed by Diversified Environmental Consultants. Prior to being so employed, he was a consulting engineer with Frank Thomas and Associates, doing industrial hygiene, air pollution control and some waste water treatment design. He graduated from Case Western Reserve University; and, took evening courses for his Masters at Cleveland State University. His work involved the assembling of testing equipment used at Brown Insulating Company for a collection of a representative air sample

from within the breathing zone of two of their employees (TrB 151-152). He tested two employees on June 2, 1977. One employee was working at the dry band saw which cut dry asbestos; and, the other employee (mix maker) was working at the mix (TrB 153-154). He collected the fibers onto a filter media which was encased in the open face filter holder. The men went about their regular tasks during the testing period (TrB 154-155). From the information he recited, he could calculate the asbestos concentration in terms of fibers per cubic centimeter. For employee one (saw man), the concentration was 1.15 fibers per cubic centimeter. For employee two (mix maker), the concentration was 0.8 fibers per cubic centimeter (TrB 158).

Mr. Gregory's testimony with reference to there being economically feasible systems of controls to remove asbestos dust from the air revealed he attended a one-week training course at Michigan State University, which involved the design of various ventilation systems for controlling industrial air contaminants; and, was told to design a system which would control such contaminants (TrA 47-48). Mr. Gregory had a ten-week course at the University of Cincinnati in ventilation dust control. The course involved the designing of different ventilating systems depending on the types of contaminants to be controlled. Mr. Gregory never performed any ventilation problems involving asbestos dust (TrB 98-100). Mr. Gregory prepared drawings which indicated suggested approaches which would have to have some adaptation to the particular circumstances in the Brown plant (TrB 106). Mr. Gregory stated the diagrams identified as Exhibits C-33-A, C-33-B and C-34 were made after his inspection of January, 1977. The drawings were never shown to anyone at Brown (TrB 201). The drawings and designs were taken from the Industrial Ventilation Manual. He stated he would not guarantee his

drawings could be made up into a commercially feasible operation which would comply with OSHA regulations, since his drawings indicated only "possible" methods. Whether or not the controls would be workable or not, if modified, Mr. Gregory would not be able to say (TrB 204-205). As far as getting a price which he "could stick to" as to cost, he would not be able to do that (TrB 205).

Mr. Weed, a manufacturer's agent, represents Haufman Air and Filtration Division of Clarkson Industries in Northern Ohio. Haufman manufactures dust collecting systems capable of generating capture velocity in the neighborhood of 3,000 cubic feet per minute (TrB 175). On cross-examination, Mr. Weed testified the only equipment he ever installed to deal with an asbestos dust problem was a portable vacuum cleaner with a special nozzle in a plant where band saw insulation asbestos sleeves were being cut to fit steam pipes (TrB 181-182).

Mr. Weed does not know anything about the Brown plant or its operation. He would agree he would want to see the operation before he could come to any conclusion as to whether or not any of the systems he had to sell would be effective. He said he would not even attempt an equipment "sizing" without seeing the Brown plant; and, he would not guarantee the equipment would perform the service required of it, until he had made an inspection (TrB 185-186).

John Wesley Brown III has been employed with Brown since 1970 (TrA 286). He went out for bids on dust-collecting equipment back in 1975. Finally, the bids were narrowed down to two companies (TrA 290). The dust collector people would guarantee they would not emit any fibers larger than one micron from their dust collectors. There was no guarantee they would pick the fibers up. The fibers had to be delivered to their dust collectors. The

air that would be delivered to the dust collector is the problem of the duct man (TrA 291). Bids were sought on the ducts. Each dust collector system had their own dusting man. Various pickups were designed. OSHA velocities and engineering standards were used, but none of the duct people would guarantee their ducts would pick up the amount of dust in the air that would be carried (TrA 291). The lowest quote Brown looked at was around $40,000; and, the highest bid was $112,000 or $120,000. The duct people would not guarantee they would collect all of the dust laden air, because they wouldn't have control over the individual using the equipment (TrA 292). The systems were not accepted because OSHA was changing the requirements; and, the dust collecting companies would not guarantee the equipment in 1975 or 1976 would meet the then OSHA standards; and, the equipment would be obsolete by the new standards (TrA 316-318).

Dr. Sprinkle has been employed with Brown for three and three-quarter years. He graduated from Massachusetts Institute of Technology with his Masters in 1952. He obtained his Doctorate in 1955.

Dr. Sprinkle was involved with Tad Brown in searching for either dust collectors or those who were in duct or ventilating fields in order to see if there were products which could be combined which would meet OSHA standards, insofar as airborne asbestos fibers were concerned (TrA 326). Sly and Torit were the only ones who finally indicated they were interested. Neither Sly nor Torit indicated to Dr. Sprinkle such equipment could be built (TrA 328). While the dust collection might collect dust, there was no guarantee it would collect all of the asbestos fibers in excess of the allowable limit of two asbestos fibers per cubic centimeter in all of the air in the plant (TrA 329).

Based upon all of the facts set out above, the Petitioner, Brown Insulating System, Inc., respectfully submits it has been deprived of its individual rights and equal protection of the laws of the United States guaranteed to it by the Federal Constitution.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The Circuit Court concluded (1) the statute and regulation involved were constitutional; and, (2) the regulation 29 C.F.R. 1910.1001(b)(2) was correctly construed to mean the setting of standards for ambient air in the plant, rather than the air actually being breathed by employees using respirators with filters; and, (3) the ambient air in the plant violated the above regulations; and, (4) there was substantial evidence that it was economically feasible, and with available equipment, to bring the ambient air in the plant into compliance with said regulation.

The Petitioner respectfully contends it is afforded equal protection under and by virtue of the First, Fourth and Fourteenth Amendments of the Constitution of the United States; and, that such rights have been violated; and, the Order of the Circuit Court of Appeals disregarded the rights of the Petitioner; and, in affirming the provisions of Title 29, Code of Federal Regualtions, 1910.1001(b)(2) and (e)(1)(i), has, judicially, put the Petitioner out of business.

A violation of the asbestos standard should be based on the quality of air breathed by employees using respirators, rather than on the degree of contamination in the ambient air.

If a violation of the standard is based upon the quality of the ambient air, it is arbitrary and capricious and, there-

fore, invalid. The standard, as worded, is confusing and lacks clarity, making it impossible for employers using asbestos, to comply with the standard, as interpreted by the Circuit Court.

This is the first case which has tested the asbestos standard, by arguing a violation thereof should be based on the quality of air breathed by employees using respirators, rather than on the degree of contamination in the ambient air.

The Secretary of Labor has secured an Order ordering the reissuance of the Order of the Circuit Court as an opinion, appropriate for publication, "since the case decides an important question of first impression for this (asbestos) standard", as stated by the Secretary of Labor.

It is submitted the word "exposed" as used in the regulation has to be interpreted to mean "breathing air *into the lungs* which contains an excess of two (2) asbestos fibers five (5) micrometers in length per cubic centimeter of air", since the exposure sought to be eliminated deals only with carcinogenic infections of the *lungs*. The asbestos fibers must infiltrate the *lungs* before the claimed asbestos dust related mesotheliomas and pulmonary carcinomas can develop. Workmen could be "exposed" by the interpretation made by the choice of the Secretary of Labor and the Circuit Court by merely walking through an area, completely insulated from breathing asbestos fibers into their lungs; and yet violations of the regulation could be proved and sustained.

The use of the words "exposure" and "exposed", as used in the regulations in issue, without definitive explanations, places an unreasonable and unfair burden upon an employer.

In the case of *Thrall Manufacturing Company,* OSHRC Docket No. 76-3816, Louis G. LaVecchio, Judge, 1979 OSHD, ¶ 23932, 10-23-79, the Judge held:

> "Charges of exposing welders to excess fluorides, iron oxides and respirable dust and failing to install engineering controls, in nonserious violation of § 1910.-1000, were vacated for lack of proof of exposure and feasibility of controls. Air samples collected by cassettes placed on worker clothing rather than inside the welding hood were not representative of breathing zone air. Only 11 of 40 samples showed excessive amounts. The proposed abatement methods were infeasible: $100 hair dryer-size individual fans would only redistribute the contaminants among the 400 welding process workers and would need to be supplemented by large air filters at a cost of $132,000."

In the case of *Secretary of Labor v. Reynolds Metals Company,* 2 OSHC 3107 (OSAHRC Docket No. 3827) August 14, 1974, Review Commissioner Judge David G. Oringer held, under the facts stated:

> [Digest] The employer, engaged in the manufacture of aluminum cans in Woodridge, N.J., was cited for an alleged nonserious violation of 29 C.F.R. 1910.95 (b)(1) for exposing its employees to excessive noise at the D & I operation, the base coating operation, and the printing operation. No penalty was proposed for the violation.
>
> The Secretary, using a general radial sound level meter, monitored the employer on three separate occasions. On each occasion, three or four employees were monitored for a period not exceeding four hours. A presumption of a violation was created because the noise levels monitored on three of the four employees

exceeded the permissible unity level during the time monitored.

"However, in order to present a prima facie case and to sustain a violation the Secretary must demonstrate that the monitored employees worked a complete workday and that the sound levels that were monitored were representative of the sound levels at the plant throughout the workday.

There was no evidence in the record about the length of the employees' workday or about the level of noise that existed in the plant throughout the whole workday. Therefore, the citation for nonserious violation was vacated."

The Occupational Safety and Health Act of 1970 is a Congressional statute that designates the stringent "substantial evidence" test for judicial review of notice-and-comment rulemaking.

In *Industrial Union Dep't v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974), the court construed the substantial evidence review in terms of the demands to be made by the reviewing court:

"What we are entitled to at all events is a careful identification by the Secretary, when his proposed standards are challenged, of the reasons why he chooses to follow one course rather than another. Where that choice purports to be based on the existence of certain determinable facts, the Secretary must, in form as well as substance, find those facts from evidence in the record. By the same token, when the Secretary is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, he should so state and go on to identify the considerations he found persuasive." 499 F.2d at 475-76.

With reference to the claimed failure to undertake the installation of engineering controls to remove asbestos dust from the air in the plant, the testimony of John W. Brown Jr. is significant.

Mr. Brown, President of Brown Insulating Systems, Inc., attended Harvard University and Harvard Business School, where, among other courses, he studied engineering and metallurgy.

Mr. Brown testified a system that would eliminate asbestos from the air or dust could be designed, but the cost is astronomical. There would have to literally be a turnover of all of the air in the plant once every four minutes. That kind of equipment would require a plant half the size of the present Brown plant (TrA 397). One of the problems involves changes in the static conditions of the plant when the air conditioning was engineered and designed in accordance with the static conditions then existing. This is true of all exhaust systems. If the plant exhaust system is designed for winter, it is absolutely wrong for summer. If it is not personnel changes or variables, it is air current changes within the rooms. Thus, to attempt to buy an exhaust system which would be adaptable and sensitive enough to make necessary changes to compensate for all of the conditions in which the plant is operated to meet and comply with the fixed OSHA standards is not possible. The expenditure for such a complete air conditioning system, even if possible to manufacture, would put Brown out of business (TrA 398-399). If the OSHA limit would be reduced from two fibers, the air conditioning equipment would have to be scrapped because the volume of air necessary to be transferred by the blower system would require a baghouse which would have to be an entirely different size.

To force or order Brown to install dust collecting equipment; and, a duct system to deliver airborne asbestos fibers to the dust collecting system, at a financial cost beyond the financial capabilities of Brown, without a guarantee the number of airborne asbestos fibers would be reduced to comply with OSHA standards, would violate the equal rights of the Petitioner guaranteed by the Fourth and Fourteenth Amendments of the Federal Constitution.

See also the proposals submitted by W. W. Sly Co., Torit Division of Donaldson Company, Inc.; and Gundlach Sheet Metal Works, Inc. (TrA 316).

In *Occupational Safety and Health—Law and Practice,* written by Baruch A. Fellner and Donald W. Savelson, A1-238, Practicing Law Institute, New York City, at pages 163-164, the problems involving "Feasibility" are discussed:

"*PROHIBITIVELY EXPENSIVE*

Given the statutory and regulatory command to implement feasible engineering controls, the questions are: Who has the initial burden of proving feasibility? What are the factual and legal parameters of that burden? How is it discharged?

The starting point for the inquiry is a landmark Court of Appeals decision, which deals only tangentially with the issue of feasibility in an enforcement context. In *Industrial Union Dep't v. Hodgson*[62] the petitioner challenged the Secretary's asbestos standard.[63] Of the many issues presented in that case, we are only concerned here with whether, in promul-

62. 499 F.2d 467 (D.C. Cir. 1974).

63. 29 C.F.R. Section 1910.93a (renumbered Section 1910.1001).

gating the asbestos standard, the Secretary properly considered economic factors in weighing feasibility.

The court took a common sense view of feasibility, concluding that Congress could not have intended "to require immediate implementation of all protective measures technologically achievable without regard for their economic impact. To the contrary, it would comport with common usage to say that a standard that is prohibitively expensive is not 'feasible.'"[64] The Court concluded: "Congress does not appear to have intended to protect employees by putting their employers out of business—either by requiring protective devices unavailable under existing technology or by making financial viability generally impossible." Senator Javits voiced a similar opinion when he introduced the amendment requiring the Secretary to consider feasibility in promulgating standards.[65]

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64. 499 F.2d at 477 (footnote omitted).

65. S. Rep. No. 91-1282, 91st Cong., 2d Sess., at 58.

In *Occupational Safety and Health—Law and Practice*, at page 171:

"IMPOSSIBILITY

Infeasibility is part of the larger affirmative defense of impossibility of performance, for the former defense amounts to no more than an assertion that it is impossible to comply with the standard for technological or economic reasons. However, whereas feasibility is an element of the Secretary's burden of proof in the context of feasibility standards, impossibility is an affirmative defense, which can be raised in the context of any standard, or of 5(a)(1).

The defense of impossibility has repeatedly been recognized by the Commission and its judges: 'Non-

compliance with the requirements of a safety standard is justified when necessary to permit the accomplishment of required work.' "[84]

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84. Secretary v. W. B. Meredith, II, Inc., OSHRC Docket No. 810, 1 OSHC 1782 (Rev. Comm'n, June 7, 1974); Secretary v. Masonry, Inc., OSHRC Docket No. 2693, 1 OSHC 3235 (ALJ, December 6, 1973); Secretary v. LaSala Contracting Company, Inc., OSHRC Docket No. 1207, 1 OSHC 3027 (ALJ, March 28, 1973); Secretary v. Deluca Construction Corporation, OSHRC Docket No. 1225, 1 OSHC 3029 (ALJ, February 9, 1973); Secretary of Labor v. Consolidated Engineering Co., Inc. and Otis Elevator Co., OSHRC Docket Nos. 394, 471, 2 OSHC 1253, 1254 (Rev. Comm'n, October 17, 1974).

In the case of *International Harvester Co.*, June 18, 1979, OSHRC Docket No. 76-4388, Sidney J. Goldstein, Judge, 1979 OSHD ¶23,740, there appears the following:

"A charge of violation of § 1910.1000 by permitting excessive exposure to lead and chromate in spray painting booths was vacated because OSHA could not say how much the recommended controls would reduce exposure. An OSHA expert testified that exposure to the contaminants *could* be reduced in one area by cleaning the ventilation system and adding distribution ductwork and baffles, at a cost of $27,000. Although the expert predicted the controls would reduce exposure, he could not say by how much."

John W. Brown Jr., President of Brown Insulating Systems, Inc., died on October 23, 1980. Mr. Brown sincerely believed, and desired his counsel to put on the record in this case, that Brown Insulating Systems, Inc. has been deprived of its rights to maintain and operate its business, as well as having been denied equal protection of the laws of the United States, as guaranteed by the Federal Constitution.

Mr. Brown, prior to his death, stated, in keeping with the testimony and evidence in this case, the Commerce

Clause of the Federal Constitution has been illegally broadened by Congress enacting legislation which regulates and restricts private business and enterprise within a State; and, thereby has unlawfully interfered with Brown's rights to carry on its business within Ohio.

The writers of the Federalist papers, such as Hamilton and Madison, clearly urged that the purpose of the Commerce Clause was only to create a common market and to prohibit state legislatures from levying taxes on goods passing in or out of the borders of the states. Therefore, the acts of Congress establishing regulatory authority over private enterprise activities within a state (Ohio) are unconstitutional and void, since such regulatory acts contravene the narrow limits of the Commerce Clause.

Further, it was not the intent of the ratifying conventions to expand the authority of Congress to interfere with the individual rights of citizens of the various states to conduct lawful private enterprises within such states.

It is the agreements and understandings of the ratifiers of the Constitution which forms and establishes the basic premise from which Congressional powers to legislate originates.

Courts, applying the Rule of Law to the fundamental understandings and agreements made when the Constitution was ratified, must, in accordance with the law, declare all regulatory acts, such as OSHA, illegal and void, because of the restrictions placed upon interference with the lawful conduct of private enterprises within the respective states.

The unconstitutional interference with the rights of Brown to carry on its private enterprise business in Ohio by the imposition of penalties for alleged violations of standards established by the Secretary of Labor acting under the authority of Congress, deprives Brown of its

constitutional rights guaranteed by the First, Fourth and Fourteenth Amendments of the Federal Constitution.

In some support for Mr. Brown's thoughts, the recently decided case of *Industrial Union Department, AFL-CIO v. American Petroleum Institute,* (S. Ct.) No. 78-911, July 2, 1980, 448 U.S. ....., provides some pertinent statements and opinions, which are set forth in the Concurring Opinions of Mr. Justice Powell and Mr. Justice Rehnquist.

Mr. Justice Powell wrote, as follows:

> "OSHA contends that §6(b)(5) not only permits but actually requires it to promulgate standards that reduce health risks without regard to economic effects, unless those effects would cause widespread dislocation throughout an entire industry. Under the threshold test adopted by the plurality today, this authority will exist only with respect to 'significant' risks. But the plurality does not reject OSHA's claim that it must reduce such risks without considering economic consequences less serious than massive dislocation. In my view, that claim is untenable.
>
> Although one might wish that Congress had spoken with greater clarity, the legislative history and purposes of the statute do not support OSHA's interpretation of the Act. It is simply unreasonable to believe that Congress intended OSHA to pursue the desirable goal of risk-free workplaces to the extent that the economic viability of particular industries—or significant segments thereof—is threatened. As the plurality observes, OSHA itself has not chosen to carry out such a self-defeating policy in all instances. *Ante,* at 39. If it did, OSHA regulations would impair the ability of American industries to compete effectively with foreign businesses and to provide employment for American workers."

Mr. Justice Rehnquist, in his Concurring Opinion, referred to the writings of John Locke, set out in his Second Treatise of Civil Government, as quoted herein:

> "In his Second Treatise of Civil Government, published in 1690, John Locke wrote that 'The power of the legislature, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.'[1] Two hundred years later, this Court expressly recognized the existence of and the necessity for limits on Congress's ability to delegate its authority to representatives of the Executive Branch: 'That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.' Field v. Clark, 143 U.S. 649, 692 (1892).

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1. J. Locke, Second Treatise of Civil Government ¶ 141 (1690). In the same treatise, Locke also wrote that 'The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others.' Ibid."

CONCLUSION

As has been stated, this is the first case which has tested the asbestos standard, by arguing a violation thereof should be based on the quality of air breathed by employees using respirators, rather than on the degree of asbestos contamination in the ambient air in a plant.

The Secretary of Labor has said, in a Motion to Publish Decision, filed July 24, 1980:

> "2. A decision, such as this one, sustaining the agency's choice of how to regulate a particular substance is of great benefit to effective enforcement of the Act and the Secretary's health standards. No other court of appeals has tested the asbestos regulation against an attack such as petitioner mounted here. The Court's disposition of this case decides an important question of first impression for this standard, and to avoid unnecessary relitigation in this forum and possibly others, the decision should be permitted to attain the status of a precedent."

Just as the Secretary of Labor believes the case represents an important decision, the Petitioner is anxious and hopeful the Court will consider hearing this case.

The case presents a definite issue concerning deprivation of guaranteed constitutional rights, as well as an issue recognized by the Secretary as an important "keystone" which the Court should decide as to whether or not the Secretary's choice to regulate the ambient air for asbestos content, rather than to determine whether there is a violation based upon the quality of air actually being breathed by workmen, is a judicious, fair and equitable choice, which does not prejudice the rights of the Petitioner to a

fair trial, based upon the testimony and evidence; and the weight and value thereof, in accordance with law.

Therefore, it is respectfully requested a Writ of Certiorari be allowed; and, that this Court review the Opinion and Order of the United States Court of Appeals for the Sixth Circuit and reverse the same.

Respectfully submitted,

HARLEY J. MCNEAL
MCNEAL, SCHICK & ARCHIBALD
520 Williamson Building
Cleveland, Ohio 44114
Counsel for Petitioner

November 11, 1980

APPENDIX

OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 16, 1980)

No. 78-3386

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BROWN INSULATING SYSTEMS, INC.,
Petitioner-Appellant,

v.

SECRETARY OF LABOR and OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents-Appellees.

ORDER

Before: WEICK, KEITH and BROWN, *Circuit Judges.*

Appellant, Brown Insulating Systems, Inc., seeks a review of a decision by the Occupational Safety & Health Review Commission (OSHRC) finding serious and willful violations by appellant of the standards regulating exposure of its employees to asbestos fibers in the ambient air in appellant's plant.

Appellant contends that the decision by the ALJ to such effect is erroneous because (1) the statute and regulations involved here are unconstitutional since the national government has no power under the Constitution to regulate such matters; (2) that if the regulation is construed

to set standards for the ambient air in appellant's plant rather than the air actually breathed by the employees while using respirators with filters, it is unconstitutional as being arbitrary and capricious; (3) that the regulation, properly construed, does not set standards for the ambient air in the plant but rather regulates only the quality of the air actually breathed by the employees; (4) that there was not substantial evidence that the ambient air in the plant actually failed to meet the standard contained in the regulation; and (5) that there was not substantial evidence that it was economically feasible and with available equipment to cure any violation of the standard with respect to the air in the plant.

The court concludes that the statute and regulation, as construed, are constitutional and that the regulation was correctly construed. We further conclude that there was substantial evidence that the ambient air in the plant violated the regulation, especially in the light of the testimony of appellant's president on this subject. We still further conclude that there was substantial evidence that it was economically feasible and with available equipment to bring the ambient air in the plant into compliance with the regulation.

It is therefore Ordered that the petition to review the decision and order of OSHRC be and the same is denied and the decision and order are affirmed and enforced.

Entered by Order of the Court

/s/ JOHN P. HEHMAN
Clerk

DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

(Filed April 20, 1978)

OSHRC Docket No. 77-787
UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

1365 Peachtree Street, N.E., Suite 400
Atlanta, Georgia 30309

SECRETARY OF LABOR,
Complainant,

SECRETARY V. BROWN INSULATING SYSTEMS, INC.
Respondent.

NOTICE OF DECISION

1. Enclosed herewith is my decision in the above-entitled case. It will be filed on April 20, 1978, and will become the final order of the Commission pursuant to 29 U.S.C. § 661(i) on May 22, 1978, unless a member of the Commission directs that it be reviewed. Parties will not receive any further communication from the Commission unless it is directed for review (see Paragraph 4 below).

2. You may petition for review of this decision by the Commission. An original and *six* copies of such a petition must be submitted in accordance with 29 C.F.R. § 2200.91(a). In order to assure careful consideration thereof it should be sent to me so that it can be incorporated with my decision and filed with it on April 20,

1978. Petitions will be accepted after that filing date, but there is no guarantee that there will be sufficient time to fully consider them. The final order date is statutory and cannot be extended under any circumstances.

3. Petitions for review submitted prior to the above-noted filing date should be sent to me at the address above. Those submitted *after* the filing date should be mailed to:

   Richard Schiffmann, Chief Review Counsel
   Occupational Safety & Health Review Commission
   1825 K Street, N. W.
   Washington, D. C. 20006

4. Should review be granted by a member of the Commission, each party to this case will be notified and each will be given an opportunity to submit a brief to the members prior to their final disposition of the case.

5. It would be appreciated if you would execute the enclosed postcard and mail it at once so that your present intention on seeking review of this decision may be known. It does not bind you in any way, but is used only to project future workload.

/s/ PAUL L. BRADY
Judge

DECISION AND ORDER

APPEARANCES: Bruce C. Heslop, Esquire
Office of the Solicitor
U.S. Department of Labor
881 Federal Office Building
1240 East Ninth Street
Cleveland, Ohio 44199
on behalf of the Complainant

Harley J. McNeal, Esquire
McNeal, Schick & Archibald
520 Williamson Building
Cleveland, Ohio 44114
on behalf of the Respondent

BRADY, *Judge*: This proceeding is brought pursuant to section 10 of the Occupational Safety and Health Act of 1970 (Act) to contest two citations and a notification of failure to correct violation issued February 25, 1977. It is alleged that as a result of an inspection of respondent's workplace located at 11941 Abbey Road, North Royalton, Ohio, respondent violated section 5(a)(2) of the Act by failing to comply with specific occupational safety and health standards promulgated by the Secretary, pursuant to section 6 thereof.

The basic facts, which are not in dispute, reveal that the respondent maintains a manufacturing facility at North Royalton, Ohio, where it is engaged in the manufacture of insulating sleeves for risers used in the foundry industry. On January 27, 1977, an industrial hygienist for the Occupational Safety and Health Administration (OSHA) conducted an inspection of respondent's facility as a follow-up of a previous inspection on February 25, 1976. Personal air samples were taken to determine the levels of employee exposure to airborne concentrations of asbestos fibers. Em-

ployees were tested while performing their duties in the wet-cutting and mixing operations.

The mixing operation consists of three mixing tanks in which asbestos, silica sand, silica flour, resin and water are mixed to form a slurry. Employees pour the material from bags into the mix tanks while standing on a platform adjacent thereto.

The wet-cutting operation is performed with the use of a band saw which wet cuts insulating sleeves into various lengths.

The evidence shows that air samples were taken with a Bendix personal sampling pump and three-stage polystyrene sampling cassettes. The cassettes held "AA" filters with a pore size of .8 microns. Prior to and after the inspection the hygienist calibrated both pumps to determine that they were properly drawing air through the filters at a flow rate of 2 liters per minute. The pumps were identified, and the procedure for conducting the sampling, in addition to the manner in which the samples were handled prior to the analysis was fully explained by the industrial hygienist (Tr. I, 58-61, 99, 103-106, 110, 120-121, 125-134, Exhs. C-15-19). The procedure followed upon receipt of the samples at the laboratory, was described by the analyst (Tr. II, 6-11, 15-25, 81-89).

ALLEGED VIOLATION OF 29 C.F.R. 1910.1001(b)(2)

The Secretary alleges a serious violation of the standard in Item 2a of Citation 1, and a willful violation of the standard in Item 1a of Citation 2. The standard, which pertains to permissible exposure to airborne concentrations of asbestos fibers, provides as follows:

> The 8-hour time-weighted average airborne concentrations of asbestos fibers to which any employee may be exposed shall not exceed five fibers, longer than 5

micrometers, per cubic centimeter of air, as determined by the method prescribed in paragraph (e) of this section.

Paragraph (e), which designates the method of measurement, states:

All determinations of airborne concentrations of asbestos fibers shall be made by the membrane filter method at 400-450 X (magnification) (4 millimeter objective) with phase contrast illumination.

The alleged serious violation is described in Citation 1 as follows:

Employee(s) were exposed to an 8-hour time weighted average airborne concentration of asbestos fibers in excess of 2 fibers longer than 4 micrometers, per cubic centimeter of air:

The employee performing the wet cutting operation at the south end of the mold room was exposed to 4.73 asbestos fibers longer that 5 micrometers, per cubic centimeter of air for an 8 hour time weighted average airborne concentration.

The alleged willful violation is described in Citation 2 as follows:

Employee(s) were exposed to an 8-hour time weighted average airborne concentration of asbestos fibers in excess of 2 fibers longer than 5 micrometers, per cubic centimeter of air:

The employee performing the Mixing Operation (Mix Man) on the Die Tank, Ductile Tank and Steel Tank in the Mold room or Mixing room was exposed to asbestos fibers at a concentration of 19.70 fibers longer than 5 micrometers, per cubic centimeter of air for an 8 hour time weighted average airborne concentration.

Mr. Daryl Peterson testified that he conducted the analysis of the air samples. He stated that they were received at the OSHA analytical laboratory on February 7, 1977. Immediately thereafter they were assigned laboratory numbers and he proceeded to determine that the seals were intact and the samples properly mounted (Tr. II, 6-11, Exh. C-18, 19, 24). Each sample was analyzed to ascertain the type and number and fibers longer than five micrometers per centimeter. The instrument used was a Zeiss Binocular Phase Contrast Microscope with polarized light at a magnification of 400 X, with a Patterson globe and circle reticle in the eyepiece. Mr. Peterson determined the presence of amosite asbestos in three or four samples using the dispersion staining technique (Tr. II, 16-25, 62-67, Exhs. C-27a and b).

Mr. Earl Gregory, Industrial Hygienist, testified that based upon the analysis of ten samples taken from Mr. Stapleton, the mixing Operator, he calculated that Stapleton was exposed to an 8-hour time-weighted average of 19.7 fibers longer than 5 micrometers per cubic centimeter of air. An analysis of four samples from Mr. Arbogast, the wet-cutting operator, revealed he was exposed to an 8-hour time-weighted average of 4.73 fibers longer than 5 micrometers per cubic centimeter of air. The total duration of sampling of Stapleton was 451.5 minutes and Abrogast 456.5 minutes. The time-weighted average was calculated by multiplying the fibers per cubic centimeter times the duration of each sampling and dividing the results by 481 minutes (8 hours) (Tr. II, 81-88, Exhs. C-15-17 and 25, 26, 31).

The exposure calculations indicated that Stapleton was exposed to nine times the allowable limit, while Arbogast's exposure was over twice the limit.

In defense, respondent attacks the analytical results of the sampling, and maintains that dispersion staining procedures were not conducted on all of the samples, therefore it could not be accurately determined that amosite asbestos was present in the concentrations found by complainant. Respondent also contends that it had not violated the standard because there was no evidence presented which showed the presence of asbestos inside the respirators which were worn by the employees.

Thus, it is argued that "exposed" as used in the standard refers to the air actually being respired by employees, which in this case would be the air in the employees' breathing zone inside the mask.

The record reflects that the dispersion staining technique is a specific test to determine amosite fibers. It was testified by Mr. Peterson that using a dispersion medium with a known refractive index of 1.67, the amosite asbestos fibers exhibited a specific color change from yellow to a purplish color. The record reflects that this technique is separate from the one employed to determine the number of fibers per cubic centimeter.

Mr. Peterson testified that on the basis of his experience in analyzing approximately 2,500 asbestos samples, he counted and recorded the length, aspect ratio, and amphibole structure of amosite asbestos. The number of fibers within the reticle field which exceeded five micrometers in length was determined by reference to a calibrated visual circle on the reticle.

Respondent provided no evidence to refute the accuracy of the count or the presence of amosite asbestos. In fact, respondent's President stated that amosite asbestos is used in the manufacturing process at the plant, and admittedly asbestos fibers are present in excess of the

allowable limits in the mixing and wet saw areas (Tr. I, 387, 392, 407, 418).

There is no dispute that respondent's employees were wearing air-purifying respirator masks at the time of the sampling. Also, Mr. Gregory did not sample the air within the mask, but the sampling was performed with filter cassettes attached as close as possible to the employees' breathing zones.

In support of its contention that the air inside the masks contained concentrations of asbestos below the limits of the standard, respondent presented the testimony of two consultants who conducted air sampling under the mask of the mixing operator on April 20, 1977, and June 2, 1977. Based upon the sampling, both witnesses testified that the concentrations of asbestos were less than 2 fibers per cubic centimeter.

Complainant points out various defects in the methods used by consultants in addition to the fact that the tests were conducted on a date subsequent to the inspection. It is argued that the sampling pumps were not properly calibrated to insure accurate flow rate, and therefore it was impossible to determine whether the pumps were drawing air through the filters at the set flow rate contended by respondent.

The view of the respondent as to the application of the standard is not supported by the record. It is implicit within the clear meaning of the standard that use of materials containing asbestos fibers under the conditions present in this case is the hazard to be protected against. The complainant correctly points out that whether the limits of the standard have been exceeded is determined by the level of "airborne concentration of asbestos fibers" in the employees' working environment, and not the con-

centration of fibers inside a respiratory protection device worn by the employee. This conclusion is supported by the language in 29 C.F.R. 1910.1001(d)(1) which states that compliance with the exposure limits of 1910.1001(b) may not be achieved by the use of respirators except under certain enumerated circumstances, none of which apply to this case. Thus, it is clear that the proper criteria is the airborne concentrations of asbestos fibers in the air comprising the working environment of the employee, and not concentrations found to exist after filtering with a respiratory protection device.

Therefore, it is held that employees engaged in mixing and wet cutting were, on the day of the inspection, exposed to excessive concentrations of airborne asbestos fibers in violation of the standard.

ALLEGED VIOLATION OF 29 C.F.R. 1910.1001(c)(1)(i)

This standard, which pertains to methods of compliance with the exposure limits described in 29 C.F.R. 1910.1001(b)(2), provides as follows:

> (c) *Methods of compliance*—(1) *Engineering methods.* (i) *Engineering controls.* Engineering controls, such as, but not limited to, isolation, enclosure, exhaust ventilation, and dust collection, shall be used to meet the exposure limits prescribed in paragraph (b) of this section.

The violation is described in Citation 1 as follows:

> Engineering controls were not used to reduce employee exposure to asbestos fibers to the exposure limits prescribed in paragraph (b) of this section:
>
> The employee performing the wet cutting operation at the south end of the mold room was exposed to 4.73 asbestos fibers longer than 5 micrometers, per

cubic centimeter of air for an 8 hour time weighted average airborne concentration.

The alleged violation is described in Citation 2 as follows:

> Engineering controls were not used to reduce employee exposure to asbestos fibers to the exposure limits prescribed in paragraph (b) of this section:
>
> The employee performing the Mixing Operation (Mix Man) on the Die Tank, Ductile Tank, and Steel Tank in the mold room or mixing room was exposed to asbestos fibers at a concentration of 19.70 fibers longer than 5 micrometers, per cubic centimeter of air for an 8 hour time weighted average airborne concentration.

Complainant's evidence showed that bags of asbestos silica and other ingredients are poured directly into the mix tanks, thus generating airborne dust. The inspecting officer found that the only engineering control present was a shop-type vacuum cleaner with a four-inch diameter hose at the side of each mix tank (Tr. II, 90-92). This was the same and only type of dust control found in use during the previous inspection on February 25, 1976 (Tr. II, 96).

A testing of the "capture velocity" of the vacuum system, revealed velocities from 0 feet per minute to 75 feet per minute (FPM) at various locations adjacent to the mix tanks. The lowest velocity was found at the point where asbestos is poured into the tank. Mr. Gregory determined on the basis of his velometer testing that the controls in use by the respondent were inadequate (Tr. II, 92-95, Exh. C-32).

Mr. Gregory, who was shown to have an extensive background in the use of ventilation systems, and recommended a capture velocity of 100 to 200 FPM at the point

where dust is generated. He described two engineering approaches to control the airborne asbestos produced as part of the mixing operation (Tr. I, 45-48, Tr. II, 98-106, Exhs. C-33a and b).

The first method as shown in Exhibit C-33a involved covering the top of the mix tank except for an opening of sufficient size to allow for the pouring and mixing of the ingredients in the tank. Near the center of the tank a ventilation duct would be installed to provide a vacuum to remove dust. The vacuum would create a negative pressure within the tank so that air would be pulled inside through the opening, thus drawing dust from the air around the operator. The system would have a capture velocity of 100 to 150 FPM and a deck velocity of 3,000 FPM (Tr. II, 101-104).

His second suggestion as illustrated by Exhibit C-33b involves a partial closing of the opening near the employees' position, with utilization of a small hood through which the materials could be poured into the tank. In all other respects, this method is identical to the first approach (Tr. II, 104-106).

Mr. Charles Weed, a representative of a dust collection equipment manufacturer, and directly involved with the design and engineering aspects of industrial dust collection systems, testified that ventilation systems are available to collect the dust in accordance with the methods of control suggested by Mr. Gregory (Tr. II, 175-179).

Mr. Gregory testified that in the wet-cutting operation the only means of dust control in use on the date of inspection was the wetting of the sleeves prior to cutting (Tr. II, 108). He indicated that the sources of airborne asbestos dust were fibers and residue which stick to various parts of the saw such as the blade, drive pulley and con-

veyor. The fibers and residue become airborne after they dry and disperse during the saw operation.

Mr. Gregory suggested the use of a full or partial enclosure to cover the saw and conveyor in controlling the asbestos dust. The enclosure would be equipped with doors on each side of the conveyor to permit insertion of the sleeves for cutting, and would be ventilated by a vacuum system having a capture velocity of 100 to 150 FPM with a duct velocity of 3,000 FPM. The use of doors would not adversely affect the efficiency of the system because negative pressure inside the enclosure would pull the air inside when the doors are open, and it would not circulate into the work area. The same ventilation fan system could be used for this operation (Tr. II, 107-111, Exh. C-34).

There is no dispute that the respondent undertook various housekeeping methods including frequent vacuuming to abate the violative conditions. The evidence also shows that respondent received bids from two contractors to provide a dust control system in the mixing area. The testimony by respondent's witnesses indicate that further action in this regard was not taken because the contractors would not guarantee the equipment would reduce airborne asbestos fibers to within the limits of the standard.

Respondent's President testified that air currents within the plant would adversely affect the efficiency of the type system recommended by complainant and would require costly air conditioning of the plant facility. Mr. Weed, however, stated that air currents in the plant would not be of sufficient strength to overcome a capture velocity of 100 to 150 FPM, and alter the air pattern of the dust collection system suggested by Mr. Gregory (Tr. II, 180, 181).

Respondent's evidence with reference to the work it sought to have guaranteed related to the installation of a dust collection receptacle, and not installation of ventilation and ducting systems to remove dust from the air and carry it to the receptacle, as suggested by Mr. Gregory. It was not shown that the proposed systems of control could not be adapted for use by respondent.

The evidence clearly shows that the elements of an adequate dust collection system are available for use which is a technically feasible engineering control to collect and remove dust from the mixing and wet-cutting areas.

The standard alleged to have been violated specifies the methods of compliance which "shall be used to meet the exposure limits. . .". Thus respondent cannot rely upon the proposition that before installing a dust collection system it must be guaranteed such equipment is capable of reducing the asbestos dust to the limits prescribed.

Respondent likewise cannot rely on use of personal protective equipment, which does not constitute engineering controls within the meaning of the standard. The standard at 29 C.F.R. 1910.1001(d)(1) specifically prohibits the use of respirators to achieve compliance with the cited standard except where engineering methods of control are not technically feasible, or are feasible to an extent insufficient to reduce airborne concentrations of asbestos to within the specified limits.

The evidence in this case shows that technically feasible means of dust control are available and adaptable for respondent's use and such engineering controls have not been used within the meaning of, and in compliance with the cited standard.

ALLEGED VIOLATIONS OF THE STANDARDS UNDER 29 C.F.R. 1910.134

The standard at 29 C.F.R. 1910.134(b)(1), which pertains to use of respirators, states as follows:

> (b) *Requirements for a minimal acceptance program.* (1) Written standard operating procedures governing the selection and use of respirators shall be established.

The alleged violation is described as a failure to establish written standard operating procedures governing the selection and use of respirators in the wet-cutting and mixing operation.

This section sets forth the requirements for an employer in the establishment and maintenance of a respiratory protective program when effective engineering controls are not feasible or while they are being installed.

The evidence shows that the respirators in use by respondent's employees were selected as a result of consultation with OSHA (Tr. I, 269). Also, respondent's foreman, Mr. Brosky indicated that there are written rules with reference to the use of respirators for employees engaged in mixing and cutting, in the list of safety rules posted at the plant (Tr. I, 216). An employee testified that he had been instructed in the use of respirators (Tr. I, 253). Another employee testified that he instructs in the use of the mask, and that written instructions are posted (Tr. I, 273).

Complainant shows that an employee who purchased a respirator from respondent's maintenance department was not provided with written instructions regarding its use (Tr. I, 9). It is also asserted that the only written procedures for respirator use are instructions printed on the cartons which contain the respirators (Tr. I, 273).

The manner in which compliance with the standard shall be accomplished is not clear. In this case respirators were selected through consultation with OSHA officials, and such procedure for selecting the respirators therefore hardly justifies attack. Also, it is not shown what procedures governing use of the respirators are insufficient in meeting the requirements of this standard.

Under the circumstances of this case, it cannot be fairly held that respondent was in violation of the standard as alleged in the citation.

The standard at 29 C.F.R. 1910.134(b)(3) states:

> (3) The user shall be instructed and trained in the proper use of respirators and their limitations.

The violation is described in the citation as respondent's failure to instruct and train employees working in the wet-cutting and mixing operations, in the proper use of respirators and their limitations.

In support of the allegations complainant offers the testimony of an employee that he received no training in use of the respirator (Tr. I, 9).

The record shows that a safety consultant has periodically visited the plant in the past several months to instruct employees in the wearing and cleaning of the masks (Tr. I, 255-256). Further, there is evidence that an employee in the maintenance department has advised some employees in the proper use of respirators at the time they are purchased. It is indicated that such action is on a personal basis, and not as a representative of the employer (Tr. I, 278-279).

The record in this case clearly shows that the respondent has failed to meet the mandatory requirements of the standard as alleged. The procedure for instructing and

training employees in the proper use of respirators at the time of inspection did not adequately fulfill the employer's responsibility as contemplated by this standard.

The standard at 29 C.F.R. 1910.134(b)(5) states as follows:

> (5) Respirators should be regularly cleaned and disinfected. Those issued for the exclusive use of one worker should be cleaned after each day's use, or more often if necessary. Those used by more than one worker shall be thoroughly cleaned and disinfected after each use.

The alleged violation is described in the citation as respondent's failure to require respirators to be regularly cleaned and disinfected while being used in the wet-cutting and mixing operations.

The evidence which relates to this violation consists of Mr. Stapleton's testimony that at the time he purchased his respirator he was told that it should be cleaned at least once a week with soap and water (Tr. I, 11-12). There was testimony from another employee that at the time he purchased his respirator he was told that it should be cleaned with soap and water everyday, with a change of filters. He was also advised that there was a disinfectant spray that could be used for cleaning (Tr. I, 254).

The standards under this subsection relate to the employer's responsibility in establishing and maintaining a respiratory protective program. The evidence of record does not reflect that the employer fulfilled his responsibility in a manner consistent with the specific provisions of the standard, as it is clear that there was no definite program with reference to the cleaning of respirators.

The standard at 29 C.F.R. 1910.134(b)(9) requires regular inspection and evaluation to determine the continued effectiveness of the respirator program.

The alleged violation is described in the citation as indicating no regular inspections and evaluations were conducted to determine the continued effectiveness of the respirator program in the wet-cutting operation at the south end of the mold room.

The testimony of Mr. Stapleton indicated that the employer has never undertaken to inspect his respirator or to inquire as to its effectiveness (Tr. I, 12). It was also shown that Mr. Baltzell personally discussed respirators wtih some employees, which was in no way part of a concerted program conducted by respondent (Tr. I, 280-81).

The record is void of evidence that respondent conducted regular inspections or evaluations to determine the continued effectiveness of its respirator program.

The subsection at 29 C.F.R. 1910.134(b)(10) states as follows:

> (10) Persons should not be assigned to tasks requiring use of respirators unless it has been determined that they are physically able to perform the work and use the equipment. The local physician shall determine what health and physical conditions are pertinent. The respirator user's medical status should be reviewed periodically (for instance, annually).

It is the contention of the complainant that the standard was violated in the wet-cutting and mixing operations. Mr. Stapleton testified that he received a physical examination four months after he commenced his duties which required the use of a respirator (Tr. I, 10). An employee, Mr. Furry, and the plant manager, Dr. Sprinkle, testified that physical examinations were given to employees only after 30 days on the job because of the high rate of employee turnover (Tr. I, 230, 346-347).

The wording of the standard indicates that it is of an advisory nature except for a physician's determination of what health and physical conditions are pertinent. There is no specific date set forth as to when physical examinations shall be required upon entering into employment under circumstances requiring the use of respirators. On the basis of the evidence, it cannot be held that respondent has violated the standard as alleged.

ALLEGED FAILURE TO CORRECT VIOLATION

The record reflects that respondent was issued a citation March 26, 1976, for violation of the standards at 29 C.F.R. 1910.1001(b)(3) and (c)(1) (Tr. I, 63-65, Exh. C-4).

The citation set forth a date by which the violations were to be corrected. The citation was affirmed as a final order of the Commission pursuant to section 10(a) of the Act, as it was not contested by the respondent.

Mr. Gregory testified that the results of analysis provided by the OSHA analytical laboratory revealed the ceiling limit of 10 fibers longer than 5 micrometers per centimeter as set forth in 29 C.F.R. 1910.1001(b)(3) was exceeded (Tr. II, 82-86, Exh. C-25). The levels of exposure as shown by the exhibits in the record reveal that on January 27, 1977, Mr. Stapleton's exposure exceeded the limits of the standard in the same manner for which respondent was cited as a result of Mr. Gregory's inspection of February 25, 1976. It was previously noted in this decision that feasible engineering controls were available to control the dust generated by the mixing operation, but such controls were not utilized by the respondent. Therefore, it is clear that respondent failed to correct the violation set forth in Item 1 of the citation issued March 26, 1976, by the date specified May 28, 1976.

ALLEGED SERIOUS AND WILLFUL VIOLATIONS

The record in this case, supported by the supplements to respondent's brief, indicate that there is a substantial probability that death or serious physical harm could result from respondent's employees respiring airborne concentrations of asbestos fibers present at the workplace. Therefore, the conditions found to exist in violation of the standards at 29 C.F.R. 1910.1001(b)(2) and 1910.1001(c)(1)(i) are of a serious nature within the meaning of section 17(k) of the Act. The violations found to exist in section 29 C.F.R. 1910.134, however, under the circumstances of this case are not deemed serious.

It should be noted in discussing the alleged willful violations that the record establishes respondent is in serious violation of the standards as alleged, and has failed to correct previous violations of the same standards. It is also clear from the evidence that respondent is fully knowledgeable of the hazard involved with employee exposure to concentrations of asbestos fibers, and has known for a period of time that airborne concentrations in its plant exceed the limits set by the standard.

In spite of some minimal effort in the direction of achieving compliance, this employer continues to fall woefully short of his responsibility to meet the specific requirements of the standards. Respondent chose not to take further steps to control the dust during the mixing operation after failing to secure an absolute guarantee from two contractors to meet the known requirements of the standard. Respondent further asserts that after advising employees of the dangers associated with working under the conditions which exist at the plant, and providing air-purifying respirator masks, it has sufficiently discharged its responsibility, in defense of the violations.

The question therefore is whether this employer has willfully violated section 5(a) of the Act and the standards at 29 C.F.R. 1910.1001(b)(2) and 1910.1001(c)(1)(i) by continuing to expose its mixing operators to excessive concentrations of airborne asbestos fibers. Commission precedent, under the circumstances of this case, requires the question to be answered in the affirmative.

It must necessarily be concluded that respondent, with full knowledge of the presence of excessive concentrations of airborne asbestos fibers, consciously and intentionally failed to initiate engineering controls in violation of the standard, and adopted a policy in deliberate disregard of the Act and applicable standards. The foregoing shows that the test of willfulness under the Act has been met as respondent's course of action was taken in a conscious, intentional, deliberate and voluntary manner. *F. X. Messina Construction Corp. v. O.S.H.R.C.*, 505 F.2d 701 (1st Cir., 1974); *Intercounty Construction Co. v. O.S.H.R.C.*, 522 F.2d 777 (4th Cir., 1975); *Fanning & Dorrley Construction Co., Inc.*, 1977-78 OSHD ¶22,106 (Rev. Comm., 1977). In *Intercounty Construction Co. v. O.S.H.R.C. (supra)* the 4th Circuit held:

> We agree wtih the position adopted by the Commission in interpreting the statute that "willful" means action taken knowledgeably by one subject to the statutory provisions in disregard to the action's legality. No showing of malicious intent is necessary. A conscious, intentional, deliberate, voluntary decision properly is described as willful, "regardless of venial motive". 522 Fd. at 779-80.

Following this test, the Commission has held that a willful violation is established when the evidence shows that an employer was aware of the requirements of the Act, yet made a conscious and deliberate decision not to comply.

Kent Nowlin Construction, Inc., No. 9483, February 15, 1977, 5 BNA OSHC 1051, CCH OSHD ¶21,550.

The record evidence indisputably establishes that this respondent's actions constituted a willful violation of the standards as alleged.

PENALTIES

The record reflects a lengthy history of violations by the respondent as to the exposure of its employees to excessive concentrations of asbestos. Despite the issuance of citations and notifications of failure to correct violations over a two-year period, respondent has done very little to reduce such exposure.

In determining the appropriate penalties, under the circumstances of this case, the Commission is bound by section 17(j) of the Act to give "due consideration" to the size of the employer's business, gravity of the violation, good faith of the employer, and his history of previous violations. In *Secretary v. Nacirema Operating Company, Inc.*, 72 OSAHRC 1/B10, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶15,032 (1972), the Commission pointed out that the aforementioned criteria provided under section 17(j) cannot always be given equal weight; however, it was indicated that the principal factor to be considered is the gravity of the offense. The Commission stated in *Secretary v. National Realty and Construction Company, Inc.*, 72 OSAHRC 9/A2 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶15,028 (1972), *rev'd on other grounds*, 489 F.2d 1257 (D.C. Cir. 1973), that the elements to be considered in determining the gravity of the violation are: (1) the number of employees exposed to the risk of injury; (2) the duration of the exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury.

Weighing all of the foregoing factors in light of the circumstances, it is concluded that the following penalties are deemed reasonable and appropriate for the violations indicated:

29 C.F.R. 1910.134(b)(3)	$ 50.00
29 C.F.R. 1910.134(b)(5)	50.00
29 C.F.R. 1910.135(b)(9)	50.00
29 C.F.R. 1910.1001(b)(2)	
29 C.F.R. 1910.1001(c)(1)(i)	
Failure to Abate Violation	1,500.00
Willful Violation	1,500.00

FINDINGS OF FACT

1. Brown Insulating Systems, Inc., maintains a place of employment at North Royalton, Ohio, where it is engaged in the manufacture of insulating sleeves for risers for use in the foundry industry.

2. Acceptable procedures were established for the selection and use of respirators by respondent.

3. Respondent's employees were not instructed and trained in the proper use of respirators and their limitations.

4. Respondent did not require respirators to be regularly cleaned and disinfected by the users thereof.

5. Regular inspections or evaluations were not conducted to determine the effectiveness of the use of respirators.

6. Respondent's employees were physically able to perform their assigned tasks with the use of respirators.

7. As the result of an inspection on January 28, 1975, respondent's employees were exposed to airborne concentrations of asbestos in serious violation of the applicable

standards. On February 25, 1976, the same violative conditions continued without abatement.

8. On January 27, 1977, previous violative conditions were not abated and respondent had adopted a policy of conscious disregard of the Act and applicable standards.

CONCLUSIONS OF LAW

1. Brown Insulating Systems, Inc., at all times pertinent hereto, was an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, and the Commission has jurisdiction of the parties and the subject matter herein, pursuant to section 10(c) of the Act.

2. Respondent is, and at all times pertinent hereto, required to comply with Safety and Health regulations promulgated by the Secretary pursuant to section 6(a) of the Act.

3. On January 27, 1977, respondent was not in violation of the standards at 29 C.F.R. 1910.134(b)(1) and (b)(10).

4. On January 27, 1977, respondent was in violation of the standards at 29 C.F.R. 1910.134(b)(3), (b)(5) and (b)(9). The violations were not of a serious nature within the meaning of section 17(k) of the Act.

5. On January 27, 1977, respondent was in serious willful violation of the standards at 29 C.F.R. 1910.1001(b)(2) and (c)(1)(i), and had failed to correct previous violations of the same standards within the time specified.

Upon the basis of the foregoing findings of fact and conclusions of law and entire record, it is

ORDERED

1. That part of Citation No. 1 alleging violations of the standards at 29 C.F.R. 1910.134(b)(1) and (b)(10) is hereby vacated.

2. That part of Citation No. 1 alleging violations of the standards at 29 C.F.R. 1910.134(b)(3), (b)(5) and (b)(9) is hereby affirmed and a penalty in the amount of $150.00 is assessed.

3. The citations alleging serious and willful violations of the standards at 29 C.F.R. 1910.1001(b)(2) and (c)(1)(i) are hereby affirmed and a penalty in the amount of $1,-500.00 is assessed.

4. The notification of failure to correct violations of the standards at 29 C.F.R. 1910.1001(b)(2) and (c)(1)(i) is hereby affirmed, and a penalty in the amount of $1,-500.00 is assessed.

Dated this 20th day of April, 1978.

/s/ PAUL L. BRADY
Judge

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

(Dated September 9, 1980)

No. A-222

Supreme Court of the United States

BROWN INSULATING SYSTEMS, INC.,
Petitioner,

v.

SECRETARY OF LABOR, *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner.

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 13, 1980.

/s/ POTTER STEWART
Associate Justice of the Supreme Court of the United States

Dated this 9th day of September, 1980.

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

CODE OF FEDERAL REGULATIONS

29 C.F.R. 1910.1001(b)(2)

(b) Permissible exposure to airborne concentrations of asbestos fibers—(1) Standard effective July 7, 1972.

* * * * *

(2) Standard effective July 1, 1976. The 8-hour time-weighted average airborne concentrations of asbestos fibers to which any employee may be exposed shall not exceed two fibers, longer than 5 micrometers, per cubic centimeter of air, as determined by the method prescribed in paragraph (e) of this section.

29 C.F.R. 1910.1001(c)(1)(i)

(c) Methods of compliance—(1) Engineering methods. (i) Engineering controls. Engineering controls, such as, but not limited to, isolation, enclosure, exhaust ventilation, and dust collection, shall be used to meet the exposure limits prescribed in paragraph (b) of this section.